BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.	Application 05-02-027 (Filed February 28, 2005)

ADMINISTRATIVE LAW JUDGE'S RULING DENYING MOTION TO EXTEND THE SCHEDULE AND GRANTING IN PART, DISCOVERY LIMITS

This ruling resolves two related motions. The first of these motions was filed on June 10, 2005, by SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") (collectively "Joint Applicants") for a "Discovery Protective Order," that would cut off all discovery directed to Joint Applicants as of June 17, 2005. The second motion was filed on June 14, 2005, by Qwest Communications Corporation (Qwest). Qwest filed a Cross-Motion to Modify the Procedural Schedule, to extend the schedule for serving intervenor testimony by three weeks. In its motion, Qwest asks for an extension in the due date from June 24, 2005 until July 15, 2005 for Intervenor Reply Testimony, with a corresponding day-for-day extension in the remainder of the schedule. Qwest also asks that these extensions be revisited and subject to further extension depending of SBC's subsequent willingness to cooperate in discovery.

Responses to the Qwest Motion were filed on June 17, 2005. Responses to Applicants' Motion were filed on June 20, 2005.[1] In addition to responses in opposition to each of the motions by Applicants and Qwest, respectively, responses to each of the motions were also filed by the Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), the Community Technology Foundation of California, XO Communications Services, Inc.. Pac-West Telecomm, Inc. and Eschelon Telecom, Inc. / Advanced TelCom, Inc.

Because the Applicants' motion and the Qwest joint motion address interrelated issues, this ruling disposes of both motions together. This ruling grants, in part, and denies in part, the Motion of Applicants for a Protective Order relating to Discovery. This ruling also denies the cross-motion of Qwest seeking to extend the schedule for Intervenor Testimony by three weeks. The existing schedule shall remain in place, with Intervenor Testimony still due on June 24, 2005.

Position of Applicants

Applicants seek a cut-off for intervenor discovery, arguing that the intervenors have obtained an extremely large quantity of data on a very broad range of subjects, producing enough information to present their positions in Reply Testimony. Applicants argue that there is no justification for continued discovery after Reply Testimony has been filed.

Sections 2017(c) and 2019(b) of California Code of Civil Procedure ("CCP") are cited by Applicants as authority for the Commission to limit discovery. CCP

[1] Both Applicants, on June 20, and Qwest, on June 21, filed third-round pleadings without first obtaining advance authorization from the ALJ as required by Commission rules (Rule 45(g).) Parties are admonished to follow Commission rules.

§ 2031(e) entitles a party to seek a protective order when an "inspection of documents, tangible things or places has been demanded." Applicants argue that for good cause shown, the Commission may then make "any order that justice requires to protect any party … from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (CCP § 2031(e).)

Applicants cite ALJ-Resolution 181 which sets forth the rules for arbitration of interconnection agreements pursuant to Section 252 of the Telecommunications Act of 1996. Rule 3.5 of ALJ-Resolution 181 states that discovery will be allowed until hearings begin unless good cause has been shown to the ALJ.

Applicants argue that interveners have had ample time for discovery as shown by the 1,516 questions propounded by them to Joint Applicants, and in any event, bear responsibility to the extent interveners have somehow failed to seek some piece of relevant information. Applicants claim that Intervenors' rights to participate in this proceeding have been fully satisfied by the very aggressive and broad-ranging discovery in which they have engaged.

Applicants argue that the ALJ has ample authority to order a cut off of discovery. (See *Investigation Into NOS Communications, Inc. (U-5251-C) dba International Plus, et al.*, D.03-04-053, 2003 Cal. PUC LEXIS 272 * 13; and Rule 63 of the Commission's Rules of Practice and Procedure.)

Responses to Motion for Protective Order

Position of Qwest

Qwest filed a motion to extend the schedule for testimony by three weeks. The basis for Qwest's requested relief is set forth in its Comments filed in opposition to Applicants' Motion for a Discovery Protective Order. Qwest argues that Joint Applicants have produced little of the data and documents that

Qwest and other Protestants need to prepare testimony. To the extent that there should be a discovery cut-off at all, Qwest argues that the ALJ-Resolution 181 analogy should be followed, thus permitting discovery until the hearing begins.

Qwest argues that Joint Applicants have forced parties to litigate many discovery disputes rather than to resolve such disputes informally. Qwest claims that Joint Applicants have served discovery on the Protestants as they conduct their discovery and prepare testimony.[2]

Position of Intervenors

The intervenors filing pleadings oppose Applicants' motion for a discovery cut-off and support Qwest's Motion for a three-week extension in the schedule. Various other parties support Qwest's Motion, arguing that they have experienced similar difficulties in reference to their discovery efforts with Applicants.

ORA claims that Applicants' own actions have created the complexity and burden about which they now complain, which, in turn, have substantially delayed and hindered ORA's analysis. ORA also goes into detail regarding the continuing frustrations it has experienced in seeking to do discovery relating to the synergy models and net benefits analysis. ORA proposes – by way of a Cross-Motion for Protective Order concurrently filed and incorporated therein – a modified and expanded schedule that would incorporate Qwest's three-week

[2] ORA's cross-motion is denied to the extent ORA seeks an extension in the schedule for testimony, for the same reasons that the Qwest motion is denied. To the extent of any remaining issues raised in ORA's cross-motion concerning cut-offs for discovery and depositions, responses to the motion shall be due on June 24, 2005.

extension while providing some relief to Applicants from responding to discovery while preparing their testimony. .

TURN argues that while Joint Applicants seek a protective order cutting off discovery, it is they who have caused TURN and other intervenors to spend an inordinate amount of time on discovery disputes. TURN indicates that it is still missing responses and material provided in response to other parties that may materially affect the testimony due under the current schedule.

TURN points out that on the same day Applicants filed the motion for a discovery protective order, the Administrative Law Judge (ALJ) granted a TURN request to postpone responding to those date requests until a week after reply testimony is due.

TURN expresses a willingness to allow Joint Applicants a reprieve from responding to new data requests for a one-week period if, in exchange, the Motion of Qwest for a three-week extension is granted.

XO also supports the Qwest Motion and opposes the Applicants' Motion for a discovery cut off. XO points out that Applicants would deny parties the opportunity to conduct discovery relating to Applicants' Rebuttal Testimony, as well as to do follow up relating to cross-examination. XO contends that parties have experienced unprecedented discovery difficulties in this proceeding, with repeated stalling by Applicants, either leaving many requests unanswered or only partially answered. XO disputes Applicants claims that parties have been unreasonable in their discovery requests. XO argues that it has been cooperative in scaling back some requests and eliminating others.

Discussion

Applicants and opposing parties each express frustration at the lack of cooperation in the exchange of discovery in this proceeding. While all parties

seem to agree that discovery has been a major problem, they each blame the opposing side as the cause. The Commission must weigh the burdens imposed on all parties in the context of the need for a complete record, while maintaining discipline in the scheduling of the proceeding. Each side portrays a very different picture concerning how discovery has been conducted and who is responsible for the problems. These different views are no doubt influenced by parties' widely varying perspectives on what issues are important and how extensively the Commission should scrutinize all potential impacts of the proposed transaction. The Commission will ultimately decide on the relative importance of these substantive issues in its subsequent deliberations. For the proceeding to move forward, however, parties' conflicting views regarding the significance of discovery must be brought into some balance.

Weighing both sides' claims of non-cooperation, it is concluded that the relief proposed both by Applicants, as well as by opposing parties, goes too far, as discussed further below.

Disposition of Motion for Discovery Cut Off

First, Applicants' request to cut off discovery as of June 17, 2005 is rejected. Parties shall be permitted to continue propounding discovery up until June 24, 2005, the date that Intervenor Testimony is due. Parties may propound discovery after that date, as necessary to finalize and follow up on previous responses from Applicants. Applicants, however, shall be granted a two-week moratorium from June 24, 2005 until July 8, 2005 (the due date for Applicants' Rebuttal Testimony) during which no discovery responses shall be required from them. This moratorium period will permit Applicants to focus on preparing Rebuttal Testimony without being diverted by responding to discovery.

After Applicants serve their Rebuttal Testimony, parties shall be permitted to conduct additional discovery, as warranted, relating to Applicants' Rebuttal Testimony. Discovery relating to the Applicants' Rebuttal Testimony shall be served by July 15. Responses to the discovery shall be served within one week afterwards unless parties negotiate alternative due dates. Applicants also remain responsible for producing discovery materials relating to previous discovery propounded prior to June 24, 2005, that was either incomplete or non-responsive.

Disposition of Qwest Request to Extend the Schedule

The Motion of Qwest to extend the schedule for intervenor testimony is denied. While both Qwest and other parties have provided anecdotal accounts of discovery problems that have been encountered, such problems do not warrant a further extension in the schedule for testimony. The schedule has already been extended by two weeks to June 24, 2005 to accommodate parties' needs in preparing their testimony. Rulings have also been issued directing Applicants to provide discovery materials in response to motions that have been filed. While parties continue to experience frustration in finalizing their discovery, those frustrations are not sufficiently compelling to justify delaying the schedule by three weeks.

While parties may not have yet received every response to their discovery, a considerable body of discovery has been produced. Parties should be able to produce their testimony within the constraints of the time and discovery that has been allotted. To the extent that parties may receive additional discovery materials after the date that testimony is due, such materials may still be of use in preparing for cross-examination of opposing witnesses, or in better understanding Applicants' testimony. Also, to the extent that parties believe that Applicants have failed to produce satisfactory discovery to support their claims,

parties may point out any such deficiencies in their testimony, and may propose that the Commission draw negative inferences concerning the weakness of Applicants' claims in such instances.

IT IS RULED that:

1. The Motion of Applicants for a discovery cut off is granted in part and denied in part, as set forth above.

2. The Motion of Qwest Communications Corporation to delay the schedule for Intervenor Testimony by three weeks is hereby denied.

3. ORA's cross-motion is denied to the extent ORA seeks an extension in the schedule for testimony, for the same reasons that the Qwest motion is denied. To the extent of any remaining issues raised in ORA's cross-motion concerning cut-offs for discovery and depositions, responses to the motion shall be due on June 24, 2005.

Dated June 22, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion to Extend the Schedule and Granting in Part, Discovery Limits on all parties of record in this proceeding or their attorneys of record.

Dated June 22, 2005, at San Francisco, California.

/s/ FANNIE SID
Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.